Filed 12/5/08 P. v. Mvuemba CA2/1
Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LANDU MICHAEL MVUEMBA, Defendant and Appellant.	B186622 (Los Angeles County Super. Ct. No. SA 056090)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert P. O'Neill, Judge. Affirmed.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown Jr., Attorneys General, Mary Jo Graves and Dane R. Gillette, Chief Assistant Attorneys General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson, Tita Nguyen, Kristofer Jorstad, Lawrence M. Daniels and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

Landu Michael Mvuemba appeals from his conviction of forcible rape and sodomy, attempted forcible oral copulation, and committing a lewd act upon a child. He contends that, absent appropriate jury findings, his federal constitutional rights, under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), were violated by the trial court's sentencing him to the upper terms on counts 3 and 4 and imposing "full strength" consecutive sentences on those counts pursuant to Penal Code section 667.6;[1] imposing separate sentences on counts 5 and 6 pursuant to section 654; and imposing a consecutive sentence on count 6 pursuant to section 669.

In November 2006, relying on *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), we affirmed. On January 22, 2007, the United States Supreme Court issued its opinion in *Cunningham*, which overruled *Black I* regarding a trial court's discretion to impose an upper term without jury findings. (*Cunningham*, *supra*, 549 U.S. at pp. 858-859.) In February 2007, the California Supreme Court granted review in this case, and on August 27, 2008, the Court remanded the case to us with directions to vacate our decision and reconsider the cause in light of *People v. Towne* (2008) 44 Cal.4th 63 (*Towne*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). (Cal. Rules of Court, rule 8.528(d).) Having reconsidered, we again affirm.

BACKGROUND

On April 17, 2005, Mvuemba encountered a 15-year-old female in the parking lot of a Chuck-E-Cheese restaurant, gave her his phone number, and then invited her to his car to smoke marijuana and drink alcohol. She entered his car, and he then drove to another location while they smoked and drank. During the time the victim was in his car, Mvuemba sucked her breast, penetrated her vaginally and anally, and tried to force her to engage in oral copulation. Soon thereafter, while the victim was still in his car, a police officer pulled Mvuemba over for making an illegal left turn while driving without license

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1 All other statutory references are to the Penal Code.

plates. The victim told the officer some of what had happened and was taken to a rape treatment center. Mvuemba was arrested.

Mvuemba was convicted by a jury of forcible rape (count 3), forcible sodomy (count 4), attempted forcible oral copulation (count 5), and one count of committing a lewd act upon a minor (count 6). The charging information alleged that Mvuemba had suffered a prior felony conviction in 1997 for attempted robbery as defined by section 1170.12, sudivisions (a) through (d) and section 667, subdivisions (b) through (i), as well as a prior serious felony conviction as defined by section 667, subdivision (a)(1) and a prior prison term as defined by section 667.5, subdivision (b).

Before trial, Mvuemba admitted a prior serious felony conviction for attempted robbery and a corresponding prior prison term. At sentencing, the court stated that it had read and considered the probation officer's report and the prosecution's sentencing memorandum. As to count 3, forcible rape, the court imposed the high term of eight years, based upon its "finding in aggravation that there is evidence of planning by taking the victim to a more remote, secluded location to accomplish this sexual assault." The court found no factors in mitigation, and based on Mvuemba's prior serious felony conviction, pursuant to sections 1170.12, subdivision (a) and 667, subdivision (b), doubled the high term. As to count 4, forcible sodomy, the court imposed the high term of eight years, found in aggravation that Mvuemba was on parole at the time of the offense, found no factors in mitigation, doubled the term, and ordered the term to run consecutively to that for count 3. Regarding its choice of full consecutive sentences on counts 3 and 4, the court stated, "On counts 3 and 4, the court will sentence pursuant to . . . section 667.6[, subdivision] (c) because I find that the victim was particularly vulnerable. [¶] She was developmentally disabled, and her condition was readily apparent to anyone, . . . and the crimes involved in counts 3 and 4 involved a high degree of callousness." The court imposed the midterm of three years for count 5, attempted forcible oral copulation, doubled it for the prior strike conviction, and ordered the sentence to run consecutively "because it was a separate act of violence towards the victim and in order to accomplish this act, you supplied the victim with alcohol and

marijuana[.]" The court imposed the midterm of eight months for count 6, a lewd act against a minor, doubled the sentence, and ordered it to run consecutively to the others because it was a separate act of violence against the victim. The court, pursuant to section 667, subdivision (a)(1), added five years to the sentence for the prior strike conviction, and, pursuant to section 667.5, subdivision (b), added one year to the sentence for the prior prison term, for a total prison term of 45 years and four months. The court credited Mvuemba with 147 days in custody and ordered him to pay various statutorily mandated fines and fees, to provide samples for DNA and AIDS testing, and to register as a sex offender upon release from prison. Mvuemba timely appealed.

DISCUSSION

Mvuemba contends that, in the absence of a jury finding aggravating sentencing factors, the court violated his federal constitutional rights by imposing upper terms for counts 3 and 4, by imposing full-strength consecutive terms for counts 3 and 4, by imposing separate sentences for counts 5 and 6, and by imposing a consecutive sentence for count 6. His arguments all derive from his overarching argument that under *Cunningham*, *supra*, 542 U.S. 296, the United States Supreme Court prohibits a court, in sentencing a defendant, from considering any aggravating factors that are not based upon findings by the jury that convicted him of the offense for which he is being sentenced. We disagree.

I. Imposition of Upper Terms

Mvuemba contends that *Cunningham* requires reversal of the upper term sentences on counts 3 and 4. In interpreting *Cunningham*, however, our Supreme Court in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) held that the existence of a single recidivism-based aggravating factor, which does not require a jury finding, is sufficient to make a convicted defendant eligible for an upper-term sentence. (*Id.* at p. 813.) Moreover, "[S]o long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in

exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Ibid*.) Mvuemba was on parole when he was arrested for the current offenses, an aggravating factor that required no jury finding and made him eligible for the upper term. (*Towne*, *supra*, 44 Cal.4th at p. 79 [Sixth Amendment jury trial right "does not extend to the circumstance that a defendant was on probation or parole at the time of the offense or has served a prior prison term"].) Because his parole status made Mvuemba eligible for the upper term, the trial court, under *Black II*, was free to rely upon the victim's particular vulnerability and evidence of planning, both of which factors are supported by the record, and neither of which Mvuemba disputes. (See *Black II*, *supra*, 41 Cal.4th at pp. 813, 815-816.) Neither *Towne*, *supra*, 44 Cal.4th 63, nor *Sandoval*, *supra*, 41 Cal.4th 825, undercut the holdings in *Black II*. We are, of course, bound to follow our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

II. Consecutive Sentences

Mvuemba contends that, absent jury findings to support consecutive terms, under *Cunningham* and other federal cases, the court erred in imposing full consecutive terms for counts 3 and 4 pursuant to section 667.6,[2] and a consecutive term for count 6 pursuant

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[2] Section 667.6, subdivision (c) provides, in pertinent part, "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment." Subdivision (e) lists, among others, "(1) Rape, in violation of paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261"; "(4) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 286"; "(5) Lewd or lascivious act, in violation of subdivision (b) of Section 288"; and "(7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 288a."

to section 669.[3] We disagree. *Cunningham* and related federal cases do not apply to the imposition of consecutive terms (*Black II*, *supra*, 41 Cal.4th at pp. 799, 806, 821-822), and factual findings, whether by the jury or by the court, are not required. (*Id*. at p. 822.) Although a trial court must state reasons on the record for imposing consecutive sentences under section 669, or full consecutive sentences under sections 667.6, subdivision (c), see *Black II*, *supra*, at p. 822; section 1170, subd. (c); Cal. Rules of Court, rules 4.406 (a), (b) and 4.426 (b); *People v. Belmontes* (1983) 34 Cal.3d 335, 347-348; *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1489, the court did so here, and Mvuemba does not contend otherwise. Moreover, contrary to what Mvuemba asserts, "California's [section 669] does not establish a presumption in favor of concurrent sentences; its requirement that concurrent sentences be imposed if the court does not specify how the terms must run merely provides for a default in the event the court fails to exercise its discretion." (*Black II*, *supra*, 41 Cal.4th at p. 822.) Although the Court in *Black II* specifically addressed consecutive sentencing determinations pursuant to section 669, Mvuemba gives no reasons and cites no authorities to justify treating a full consecutive sentencing decision pursuant to section 667.6, subdivision (c) differently from a decision under section 669, and we find none.

III. Section 654 and Indivisible Course of Conduct

Mvuemba further contends that for the same reasons that sentencing to an upper term requires jury findings, jury findings are required to support the application of section 654 on the issue of an "indivisible course of conduct." We disagree.

Section 654, subdivision (a) provides, in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the

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[3] Section 669 provides, in pertinent part, "When any person is convicted of two or more crimes, . . . the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. . . . [¶] . . . Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."

provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 "bars multiple punishment not only for a single criminal act but for a single indivisible course of conduct in which the defendant had only one criminal intent or objective." (*People v. Moseley* (2008) 164 Cal.App.4th 1598, 1604.)

Mvuemba contends that a defendant's intent or objective is a question of fact to be determined by the jury alone, and that by finding that counts 5 and 6 involved separate acts of violence, thus determining Mvuemba's intent and objective and finding no indivisible course of conduct in this case, the court violated the rule in *Cunningham*. As our Supreme Court pointed out in *Black I*, however, the underlying rationale of the *Cunningham* lineage "is inapplicable to a trial court's decision whether to require that sentences on two or more offenses be served consecutively or concurrently." (*Black I*, *supra*, 35 Cal.4th at p. 1262, discussing *Blakely v. Washington* (2004) 542 U.S. 296 and *Apprendi v. New Jersey* (2000) 530 U.S. 466, both precursors to *Cunningham*.) "For purposes of the right to a jury trial, the decision whether section 654 requires that a term be stayed is analogous to the decision whether to sentence concurrently. Both are sentencing decisions made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense, and neither implicates the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense." (*Black I*, *supra*, 35 Cal.4th at p. 1264.) *Cunningham* did not address section 654, and it did not overrule *Black I* on that issue. In *Black II*, our Supreme Court held that *Cunningham* and its precursors do not apply to consecutive sentencing decisions. (*Black II*, *supra*, 41 Cal. 4th at pp. 799, 821, 822.) Accordingly, the decision underlying application of section 654 being analogous to the decision to impose a consecutive sentence, under *Black II*, jury findings are not required.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JACKSON, J.*

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* Associate Justice of the Court of Appeal, Second Appellate District, Division Seven, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.